

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 14, 2007 Session

DAVID JEFFERY HILL v. TERRI ALLISON HILL (OVERCAST)

**An Appeal from the Chancery Court for Bedford County
No. 24,836 J. B. Cox, Chancellor**

No. M2006-02753-COA-R3-CV - Filed December 17, 2007

This appeal involves post-divorce modification of child support. The parties divorced in 2004 and agreed on a parenting plan under which they shared equal custody of their children, and the father paid the mother an agreed amount in child support. In May 2005, after the new income shares child support guidelines went into effect, the father filed a motion to modify or suspend his child support obligation. The new guidelines required the father to establish a significant variance between his gross income at the time of the divorce and his gross income when he filed his motion. The father was self-employed, however, and his income level at the time of his divorce was undetermined. For comparison purposes, the trial court deemed the income on his 2002 income tax return to be his income as of the date of the divorce. Utilizing this income level, the trial court found no significant variance and denied the father's motion to modify. The father now appeals, arguing that his income at the time of the divorce should have been calculated by a reverse application of the flat percentages model of the child support guidelines. We affirm, finding no error in the trial court's use of the father's 2002 income tax return.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court is Affirmed
and the Cause is Remanded**

HOLLY M. KIRBY, J., delivered the opinion of the Court, in which DAVID R. FARMER, J., and STEVE R. DOZIER, SP. J., joined.

Jason R. Reeves, Shelbyville, Tennessee, for the appellant, David Jeffery Hill.

Trisha L. Henegar, Shelbyville, Tennessee, for the appellee, Terri Allison Hill (Overcast).

Robert E. Cooper, Jr., Attorney General and Reporter, and Juan G. Villaseñor, Assistant Attorney General, for the Attorney General in support of the constitutionality of Tennessee Child Support Guidelines.

OPINION

Petitioner/Appellant David Jeffery Hill (“Father”) and Respondent/Appellee Terri Allison Hill (Overcast) (“Mother”) married and had two children, Drew Taylor Hill (born March 22, 1994) and Jennie Clarice Hill (born February 14, 1997). They were divorced by final decree on June 21, 2004. The divorce decree incorporated the parties’ marital dissolution agreement (“MDA”) and permanent parenting plan.

Under the terms of the parties’ agreed parenting plan, they agreed to equal residential time for the children, with neither party being designated as the primary residential parent. The plan also provided that Father would pay Mother \$1,136.28 per month in child support “in accordance with the Tennessee Child Support Guidelines,” and that, in addition, Father would pay Mother \$136.22 per month for the children’s health insurance premiums. At the time of the divorce, Father was self-employed. The record does not state the level of income on which Father’s child support obligation was based.

At the time the divorce decree was entered, the child support guidelines in effect were based on the former flat percentage model, which considered only the income of the obligor parent and did not factor in the income of the obligee parent. On January 18, 2005, Tennessee’s new income shares child support guidelines went into effect; these guidelines take into account the income of both parents, as well as other factors.¹

On May 4, 2005, Father filed a motion to reduce or suspend his child support payments asking the trial court to recalculate his child support obligation under the new “income shares” guidelines. Father’s motion was accompanied by the required income shares worksheet, which listed his current monthly income as \$4,640, and factored in the parties’ shared equal residential parenting time with the children. Father’s worksheet calculated his new child support obligation to be \$157 per month. In light of this calculation, Father asserted that a significant variance existed between his child support obligation under the parties’ agreed parenting plan and the amount of child support he would owe under the new income shares guidelines. At the time Father filed his motion, the new guidelines defined the term “significant variance” as “[a]t least a fifteen percent (15%) change in the gross income of the ARP [alternate residential parent] . . . ,”² a change in the number of children for whom the ARP was responsible and supporting; a supported child became disabled; *or* the parties’ agreement to modify support *and* at least a 15% change between the current support order and the

¹ Among other things, the new guidelines changed the nomenclature. Instead of referring to the custodial or obligee parent, the new guidelines refer to the primary residential parent. Instead of the noncustodial or obligor parent, the new guidelines refer to the alternate residential parent. *See* Tenn. Comp. R. & Regs. 1240-2-4-.02.

² The definition of “gross income” in the new income shares model of the guidelines is not significantly different from the definition in the former flat percentages model, in that it includes “all income from any source” and provides a non-exhaustive list of sources of income. *See* Tenn. Comp. R. & Regs. 1240-2-4-.04(3)(a)(1).

proposed order, using the income shares worksheet.³ Tenn. Comp. R. & Regs. 1240-2-4-.05(2) effective January 18, 2005. Subsection (7) of this regulatory provision stated that, beginning January 1, 2006, the above definition of “significant variance” would be eliminated. After that, a parent seeking modification would merely have to show a 15% difference between the current support order and the proposed child support order using the income shares worksheet. Tenn. Comp. R. & Regs. 1240-2-4-.05(7) (2005). Apparently realizing that Father’s motion was based on the subsection (7) definition of “significant variance,” the parties agreed to continue the hearing on the matter until January 20, 2006, after the new provision was scheduled to become effective.⁴

No doubt to the chagrin of Father and other parties subject to child support orders, on October 14, 2005, the Tennessee Department of Human Services (“DHS”) promulgated an emergency rule, repealing subsection (7) of Rule 1240-2-4-.05, which would have changed the definition of “significant variance” to require only a showing of a 15% difference between the current and the proposed child support orders. *See* Tenn. Admin. Reg. 23-25 (Nov. 15, 2005) (available at <http://www.state.tn.us/sos/pub/tar/archived/2005-11.pdf>). DHS also published a “Statement of Necessity” for this emergency rule. In the Statement of Necessity, DHS noted concerns that the changes would result in significant increases or decreases in existing child support obligations based solely on the new methodology for calculating the support. DHS was also concerned that Tennessee courts would be “subject to an unusually high volume of requests for modification by parents seeking to improve their respective financial positions” by receiving a reduced child support obligation under the new income shares guidelines. To address these concerns, DHS decided to eliminate the new subsection (7) definition of “significant variance” and maintain the existing definition of the term, in order to “limit[] the availability of modifications . . .”⁵ *Id.*

Thus, the repeal of subsection (7) left Father unable to establish a significant variance simply by comparing the amount of his existing child support obligation to the support that would be due under the new income shares guidelines. Under the definition of “significant variance” that remained in effect, he would have to show a 15% change in his gross income from the time of the divorce to the time he filed his motion.

Father’s motion for modification was argued before the trial court on September 29, 2006. The appellate record does not include a transcript of that hearing. In the hearing, Father’s 2002,

³ In low income cases, at least a 7½% change must exist between the current support order and the amount of the proposed order. *See* Tenn. Comp. R. & Regs. 1240-2-4-.05 (2005).

⁴ We note that some of these facts are not in the appellate record, but they are taken from the parties’ briefs and representations at oral argument, and they are consistent with the orders included in the record. These facts are referred to in this Opinion as background information in order to put the issue on appeal in the proper context.

⁵ On January 6, 2006, DHS filed rulemaking hearing rules, making the emergency repeal of Subsection (7) of Rule 1240-2-4-.05 permanent. Tenn. Admin. Reg. 23-25 9 (Feb. 15, 2006) (available at <http://www.state.tn.us/sos/pub/tar/archived/2006-02.pdf>).

2003, 2004, and 2005 tax returns were submitted to the trial court as exhibits, and those exhibits are included in the appellate record.

On November 30, 2006, the trial court entered an order denying Father's motion to reduce or suspend his child support payments. In order to compare Father's income at the time of the divorce to his income at the time his motion was filed, the trial court used Father's 2002 tax return to determine his income at the time of the divorce. It then compared this income level, first to an average of Father's 2003 and 2004 income, and then also to an average of Father's 2004 and 2005 income. In considering Father's 2004 income, the trial court specifically included as income a \$7,500 vehicle depreciation deduction that was listed on his 2004 tax return. These comparisons, the court determined, yielded a 11.59% variance or less. Thus, because Father had not established a "significant variance" of at least 15%, the trial court denied Father's motion to reduce his child support obligation.

Sua sponte in the order, the trial court commented that Father "may be able to argue that it is unconstitutional for an Alternate Residential Parent to pay an amount of child support under [the] flat percentages model that is significantly greater than the obligation would be under the income shares guidelines." However, apart from this comment, the issue was neither addressed nor resolved in the trial court below.

Father now appeals the trial court's denial of his motion. He argues that the trial court erred in failing to find a significant variance under the guidelines. First, he claims that the trial court erred in using the income reflected on his 2002 tax return as his income at the time of the divorce. Instead, he asserts, the trial court should have calculated his income at that time by looking to the amount of support ordered (\$1,136) and applying the flat percentages grid to determine what level of income would have resulted in this amount of support, using the formula applied in *Casteel v. Casteel*, No. 03A01-9703-CV-00073, 1997 WL 414401 (Tenn. Ct. App. July 24, 1997). Second, Father argues that the trial court erred in including the \$7,500 depreciation expense in his 2004 income for comparison purposes. Finally, Father argues that the current income shares guidelines are unconstitutional, in that they prevent him from utilizing the income shares model to establish his child support obligation, whereas similarly situated persons divorced after January 18, 2005, are able to utilize the income shares model.

In considering the trial court's denial of Father's motion for modification of his child support obligation, we review the trial court's findings of fact *de novo* on the record, presuming those findings to be correct unless the evidence preponderates otherwise. *Huntley v. Huntley*, 61 S.W.3d 329, 334 (Tenn. Ct. App. 1991). We review the trial court's conclusions of law *de novo*, with no such presumption of correctness. *Id.*

We look first to Father's assertion that the trial court erred in failing to find a significant variance. Under Tennessee's child support guidelines, in order for an existing child support obligation to be eligible for modification, a significant variance must be established. Tenn. Comp. R. & Regs. 1240-2-4-.05(2)(a). The relevant provision of the guidelines states:

- (b) For all orders that were established or modified before January 18, 2005, under the flat percentage guidelines, and are being modified

under the income shares provisions for the first time, a significant variance is defined as:

1. ***At least a fifteen percent (15%) change in the gross income of the ARP;*** and/or
2. A change in the number of children for whom the ARP is legally responsible and actually supporting; and/or
3. A child supported by this order becoming disabled; and/or
4. The parties voluntarily entering into an agreed order to modify support in compliance with these Rules, and submitting completed worksheets with the agreed order; and
5. At least a fifteen percent (15%) change between the amount of the current support order and the proposed amount of the obligor parent's pro rata share of the BCSO if the current support is one hundred dollars (\$100) or greater per month and at least fifteen dollars (\$15) if the current support is less than one hundred dollars (\$100) per month; or
6. At least a seven and one-half percent (7.5% or 0.075) change between the amount of the current support order and the amount of the obligor parent's pro rata share of the BCSO if the tribunal determines that the Adjusted Gross Income of the parent seeking modification qualifies that parent as a low-income provider.

Tenn. Comp. R. & Regs. 1240-2-4-.05(2)(b) (2006) (emphasis added). In this case, Father was required to show at least a 15% difference in his gross income from the time that child support was originally ordered until the time that he filed his motion for modification. At all times, Father bore the burden of establishing a significant variance. ***Turner v. Turner***, 919 S.W.2d 340, 345 (Tenn. Ct. App. 1995).

In reviewing the trial court's findings on Father's income, several factors must be considered. First, it is undisputed that, at all pertinent times, Father was self-employed. Second, the record of the proceedings at the time of the parties' divorce does not include the amount of Father's income on which the child support award was predicated.⁶ Therefore, the trial court was faced with determining Father's gross income from limited evidence, consisting simply of Father's tax returns and the child support order. Third, we have no transcript or statement of the evidence on the hearing on Father's motion to modify; we have only the exhibits and the trial court's order.

The trial court's order states that it used Father's 2002 tax return as the benchmark for Father's income at the time of the parties' divorce.⁷ Father argues that using the 2002 tax return for

⁶ Mother asserts that because Father was self-employed, an application of the guidelines was never an issue when the parties agreed on the terms of the parenting plan. What the parties used in determining Father's income for purposes of arriving at an appropriate child support obligation at that time is not in this appellate record.

⁷ The trial court did not reveal in its order the exact dollar amount used for Father's 2002 income. Father states in his brief that the trial court used \$4,537.75 as his monthly gross income in 2002, and Mother claims that Father's
(continued...)

this purpose was error, because it does not accurately reflect his income at the time of the parties' 2004 divorce. Father argues that, instead, the trial court should have taken the amount of child support ordered in the decree and then reconstructed his income based on a reverse application of the then-existing child support guidelines.

In order to “reconstruct” his income in June 2004, Father urges an elaborate reverse calculation based in part on this Court’s decision in *Casteel v. Casteel*, No. 03A01-9703-CV-00073, 1997 WL 414401 (Tenn. Ct. App. July 24, 1997). In *Casteel*, the parties divorced in 1994. Although the mother had primary custody, the father spent more time with the children than the “standard” eighty days per year. A straight application of the child support guidelines would have required the father to pay \$740 per month in child support for his two children. This figure was based on expected “standard” visitation of eighty days per year. The trial court departed downward from the guidelines and ordered the father to pay only \$370 per month, based on the fact that the father spent more than eighty days per year with his children. *Casteel*, 1997 WL 414401, at *1. The mother appealed this downward departure. The appellate court upheld the trial court’s conclusion that a downward departure was justified based on the father’s extra visitation. In doing so, the appellate court set out a certain formula for determining how much departure would be warranted. Under the formula, the court must determine the obligor’s daily amount of support under a straight application of the guidelines.⁸ This amount is then multiplied by the days of visitation in excess of “standard” visitation that the obligor parent spent with the child. This annual amount of excess child support is then divided by twelve to obtain the appropriate monthly reduction, i.e. departure, from the guidelines amount of support ((number of excess days x daily amount of support)/12 = amount of departure). In *Casteel*, the appellate court determined that the father’s daily support was \$24.33 under the guidelines, and it multiplied this amount by fifty-one, the number of days in excess of the “standard” eighty days spent annually with the child. This product (\$1,240.83) was divided by twelve, and the court found by this model that the father was entitled to a reduction in his support of \$103 per month. *Id.* at *3.

In the instant case, Father argues that the trial court erred in declining to employ a reverse application of the *Casteel* formula to derive his income at the time of the divorce. He urges this Court to do the following calculation. First, from the child support agreed upon by the parties and the child support guidelines in existence in 2004, we would “back into” an income level of \$4,700 per month. Then taking into the account the fact that Father and Mother spend approximately equal

⁷(...continued)

gross income in 2002 was \$5,136.25, using various figures in the 2002 tax return. Regardless of the amount used, however, Father’s argument is the same, that the trial court erred in using the 2002 tax return as a benchmark for determining his divorce-time income as opposed to the reverse application of the guidelines under the formula employed in *Casteel*.

⁸The obligor’s daily amount of support is calculated by taking the monthly child support due under a straight application of the guidelines, then multiplying this amount by 12 (months in the year), which gives the total annual child support due. This amount is then divided by 365 (days in the year), which results in the daily amount of child support.

time with the children, and utilizing the *Casteel* formula in reverse and considering 102.5 days over the eighty-day standard time, would result in a gross income figure of \$6,800 per month.⁹

Other than the fact that the trial court reached a result not in Father's favor, Father gives no compelling reason why the trial court was required to do the complex reverse calculation he urges. We have no indication from the record how the parties calculated the amount of child support set forth in the original agreed parenting plan. The only documentary evidence of Father's self-employment income are the tax returns, which set forth Father's sworn income for the given years. This would seem to be the most reliable evidence in the record of Father's income.

Overall, we see no error in the trial court's decision to decline to utilize the *Casteel* formula to reverse engineer Father's gross income at the time of the divorce for purposes of determining whether a significant variance had been established.

Alternatively, Father argues that the trial court should have used his income as stated in his 2003 tax return, rather than the income in his 2002 return, to determine his income at the time of the divorce decree, because the 2003 return more accurately reflected his income at the time of the June 2004 divorce. At oral argument, Father acknowledged that, regardless of whether the 2002 or 2003 tax return was used for purposes of determining his gross income at the time of his divorce, he cannot show a significant variance unless he prevails on his other arguments on appeal. In light of this, we go on to consider Father's argument on the trial court's inclusion of a depreciation expense listed for 2004.

Father next argues that the trial court erred in including the \$7,500 depreciation deduction for his business vehicle expense in calculating his 2004 income, for the purpose of comparing this to his gross income. Father asserts that this amount should not have been added back to his gross income because "this expense was necessary for [Father's] continued business and because it was an actual expense" The trial court did not explain this portion of its decision; it stated only that it included the amount in its calculation of Father's 2004 income.

There are, of course, numerous possible reasons for the trial court's decision to include the \$7,500 deduction in Father's gross income for 2004, such as a finding by the trial court that this expense was extraordinary, unreasonable, or unnecessary to Father's business. As the appellant, Father has the burden of demonstrating that the evidence preponderates against the trial court's judgment. Moreover, under Rule 24 of the Tennessee Rules of Appellate Procedure, the appellant has the duty to prepare a record which conveys a fair, accurate and complete account of the proceedings in the trial court regarding the issues on appeal, including a transcript or statement of

⁹ Father explains this calculation in his appellate brief as follows:

This is derived by taking the gross income of \$6,800.00 and multiplying by 32% to derive the monthly child support of \$1,581.00. Then the \$1,581.00 is multiplied by 12 then divided by 365 to arrive at a figure of \$51.98 per day rate which is then multiplied times the number of days over 80 (102.5) resulting at a reduction of the yearly support by \$5,327.95. Once this is taken off of the guidelines amount, [Father's] support obligation becomes approximately \$1,136.00 monthly.

the evidence from which we can determine whether the evidence preponderates against the trial court's findings. In the absence of a transcript or a statement of the evidence, we conclusively presume that the findings of fact by the trial court are supported by the evidence and are correct.

See In re MLD, 182 S.W.3d 890, 895 (Tenn. Ct. App. 2005). Thus, there being no transcript or statement of the evidence, we conclusively presume that the trial court was correct in including this amount in Father's 2004 gross income for comparison purposes.

In light of this finding, utilizing the income figures from Father's tax returns in the record, our calculations do not yield a variance approaching 15%, regardless of the combination used of the 2002, 2003, 2004, and 2005 tax returns. Therefore, we find that any error by the trial court in using Father's 2002 tax return income figures was harmless error.

Finally, Father challenges the constitutionality of the child support guidelines because they prevent him from utilizing the income shares model to establish his child support obligation, whereas similarly situated persons divorced after January 18, 2005, are able to utilize the income shares model. Father does not specify the constitutional provision, in either the state or federal constitution, allegedly being violated.

It is well settled that constitutional issues not raised at trial will generally not be considered for the first time on appeal unless the statute or regulation "is so obviously unconstitutional on its face as to obviate the necessity for any discussion." *In re Adoption of E.N.R.*, 42 S.W.3d 26, 32-33 (Tenn. 2001). Here, there is no indication in the record that Father raised this issue in the trial court below; rather, the only mention of any constitutional concern is a *sua sponte* comment by the trial judge in his final order. Because Father did not appropriately raise this issue during the trial court proceedings, we deem this argument to have been waived. *Id.* at 33 (determining that a constitutional argument raised by a party in closing argument was not sufficient to preserve the issue for appeal).

Mother argues that she is entitled to attorney's fees for the fees incurred in this appeal. An award of attorney's fees is available only "if provided for by contract, statute, or a recognized ground of equity." *Parchman v. Parchman*, No. W2003-01204-COA-R3-CV, 2004 WL 2609198, at *5 (Tenn. Ct. App. Nov. 17, 2004) (quoting *Austin Powder Co. v. Thompson*, No. 03A01-9607-CV-00229, 1996 WL 718291, at *2 (Tenn. Ct. App. Dec. 16, 1996)). "In divorce cases the recovery of attorney's fees is permitted by statute, which provides that a spouse seeking enforcement of an alimony or custody award may be granted attorney's fees." *Id.* (citing Tenn. Code Ann. § 36-5-103(c) (2003)). Whether to award attorney's fees on appeal is a matter within the sole discretion of this Court. *Archer v. Archer*, 907 S.W.2d 412, 419 (Tenn. Ct. App. 1995). In making our determination, we must be mindful of "the ability of the requesting party to pay the accrued fees, the requesting party's success in the appeal, whether the requesting party sought the appeal in good faith, and any other equitable factor that need be considered." *Dulin v. Dulin*, No. W2001-02969-COA-R3-CV, 2003 WL 22071454, at *10 (Tenn. Ct. App. Sept. 3, 2003) (citing *Folk v. Folk*, 357 S.W.2d 828, 829 (Tenn. 1962)). Considering Mother's income and the outcome of this appeal, we find it equitable to award her attorney's fees in this matter. Therefore, we remand this cause for a determination of Mother's reasonable attorney's fees for this appeal.

The decision of the trial court is affirmed and the cause is remanded. Costs on appeal are to be taxed to Appellant David Jeffery Hill and his surety, for which execution may issue, if necessary.

HOLLY M. KIRBY, JUDGE